Supreme Court of the United States

No. 86-1627

OCTOBER TERM, 1986

CITY OF ANGOON, ET. AL., PETITIONERS

v.

DONALD HODEL, SECRETARY OF THE INTERIOR, ET AL., SHEE ATIKA, INC., and SEALASKA, CORP., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

DURWOOD J. ZAELKE, JR.*
Sierra Club Legal
Defense Fund, Inc.
1531 P Street, N.W.
Washington, D.C. 20005
(202) 667-4500

FREDERICK P. FURTH
JEFFREY A. GLICK
Furth, Fahrner, Bluemle
& Mason
201 Sansome Street
San Francisco, Cal. 94104
(415) 433-2070

Counsel for Petitioners

Of Counsel:

GAVIN S. APPLEBY
LIBBY C. BLACK
Paul, Hastings,
Janofsky & Walker
133 Peachtree Street, N.E.
Atlanta, Ga. 30303
(404) 588-9900

**Counsel of Record*

QUESTIONS PRESENTED

1. Whether the United States has relinquished title to the navigational servitude within the three-mile limit of Alaska's coastal waters, so that it need not comply with the procedural protection provided subsistence resources in § 810(a) of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 1320(a).

2. Whether the Ninth Circuit's holding that the prohibition against harvesting timber "within the Monument" in ANILCA § 503(d) does not apply to a private inholding located "within the *boundaries* of the Admiralty Island National Monument" conflicts with this Court's construction of the analogous geographic term "in Alaska" in ANILCA § 102 in *Amoco Production Co. v. Gambell*, 107 S. Ct. 1396 (1987).

3. Whether the Ninth Circuit erred in entering summary judgment *sua sponte* against Petitioners, without providing them an opportunity in either the district court or the court of appeals to conduct discovery or demonstrate that there were disputed issues of material fact, contrary to this Court's holding in *Fountain v. Filson*, 336 U.S. 681 (1949).

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I. Whether the Navigational Servitude Is a Property Interest Warrants Review

A. Whether the navigational servitude is a property "interest" in coastal waters entitled to the subsistence protection of ANILCA § 810, or merely a regulatory power, warrants review. The question is important not only for purposes of ANILCA § 810, but also for the many "takings" cases upholding the servitude's no-compensation rule.[1]

B. The navigational servitude is an interest in Alaska's coastal waters; Federal Respondents' discussion of the origin of the servitude does not change this. They note that for inland waters (not at issue here), the servitude "originates in

[1] *See, e.g., United States v. Cherokee Nation of Okla.*, 107 S. Ct. 1487 (1987); cases cited in Pet. at 17 n.16. *Cf. Utah Div. of State Lands v. United States*, 55 U.S.L.W. 4750 (U.S. June 8, 1987) (majority relies on *Arizona v. California*, 373 U.S. 546, 597–98 (1963), to suggest that the federal government's interest in navigable waters would shield it against compensation despite Utah's ownership of the submerged lands, while dissent asserts that *Arizona* does not provide a sufficient shield outside the limits of the navigational servitude).

the Commerce Clause [which] . . . speaks in terms of power, not property." Federal Resp. at 8, *quoting United States v. Twin City Power Co.*, 350 U.S. 222, 224 (1956). But they completely ignore that the property interest in the navigational servitude is "so subordinated" to sovereign power "as in substance to coalesce and unite in the national sovereign." *United States v. Texas*, 339 U.S. 707, 719 (1950). This property interest in the servitude is consistent with its regulatory aspects, and serves to complement, rather than contradict, the conception of the servitude as an element of sovereign power.

In the Tidelands cases, the Court reasoned that the United States acquired complete dominion over all property interests in the three-mile coastal zone when it extended sovereignty. *E.g., United States v. California*, 332 U.S. 19, 34 (1947) ("Not only has acquisition, as it were, of the three-mile belt been accomplished by the National Government, but protection and control of it has been and is a function of national external sovereignty.") The Court also reasoned that even though the State of Texas originally held both *dominium* and *imperium* over its coastal zone, the waiver of *imperium* upon admission to the Union relinquished *dominium* as well. *United States v. Texas*, 339 U.S. at 718-19 ("property interests are so subordinated to the rights of sovereignty as to follow sovereignty"). The coastal interests acquired through sovereignty are treated like any other property. *Alabama v. Texas*, 347 U.S. 272, 275 (1954) (Submerged Lands Act valid under the Property Clause).

Under the Submerged Lands Act, 43 U.S.C. §§ 1301-1356 (1982), the United States granted the States "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters," *id.* at § 1311(a), while specifically retaining the navigational servitude. *Id.* at § 1314(a).

Federal Respondents misconstrue this retention. Federal Resp. at 9. *See also* Shee Atika at 7-8. Section 1314(a) states only that the reservation "shall not be deemed to include proprietary rights of ownership . . . *of the land and natural resources which are specifically . . . assigned* to the respective States and others *by section 1311* of this title." 43 U.S.C. § 1314(a) (emphasis added). But the navigational servitude was not one of the interests "specifically . . . assigned to the respective States." Nor has it passed to private ownership. Title to the servitude remains in federal ownership.

The reasoning of *Texas* and *Alabama* and the other Tidelands cases—that the navigational servitude is a property interest as well as a regulatory power—is consistent with the Court's long line of decisions denying compensation for the use of the navigational servitude. *See, e.g.*, cases cited in Pet. at 17 n.16. Indeed, the property aspect of the servitude offers a parsimonious explanation for the no-compensation rule: the United States need not pay for what it already owns. *See Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910) (Holmes, J.) ("the Constitution . . . does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole"), *cited in United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913) (denying compensation for property interest encumbered by navigational servitude).[2] Because this exception is otherwise an "unexplained anomaly," Clark, 2 *Waters and Water Law* § 101.3(A) at 17 (1967), recognition of the servitude as a property interest, as well as a power of regulation, provides firmer protection against future "takings" claims. *Cf. First English Evangelical Lutheran Church*

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[2] *See also* Bartke, *The Navigational Servitude and Just Compensation—Struggle for a Doctrine*, 48 Or. L. Rev. 1, 38 (1968); Powell, *Just Compensation and the Navigation Power*, 31 Wash. L. Rev. 271, 271 (1956).

v. Los Angeles County, 55 U.S.L.W. 4781 (U.S. June 9, 1987) (granting compensation for "temporary" taking).

C. Federal Respondents' observation that "[t]he United States clearly does not grant title to an interest in property when it permits a party to place a breakwater in navigable waters" is irrelevant to the recognition that the servitude is an interest in Alaska's coastal waters. Federal Resp. at 8. Section 810 applies to decisions to "permit the use [or] occupancy" of public lands or interests therein, as well as decisions to dispose of such lands or interests. Federal decisions to "permit the use [or] occupancy" of public lands or interests therein clearly do not contemplate the grant of title, and the granting of title is not required for § 810 to apply.

Nor are Federal Respondents correct in suggesting that no agency has primary jurisdiction over the navigational servitude. On the contrary, the Corps of Engineers has primary jurisdiction. Pet. at 11. This is not changed by the fact that other federal agencies also have jurisdiction. This is no different than when the federal government owns on-shore lands in fee simple; even for fee lands such as national forests, federal responsibility is divided among various agencies, including the Fish and Wildlife Service and the Environmental Protection Agency.

D. Unless the navigational servitude is recognized as an interest in property, the critical resources of Alaska's coastal waters will not be protected under § 810 of ANILCA. As Congress was well aware, almost all of the Native villages with subsistence cultures are located along the Alaskan coast or upon the shore of one of the State's lakes or rivers. *See* 126 Cong. Rec. H10545 (November 12, 1980) (statement of Rep. Udall). Protection of subsistence uses of coastal resources was one of the most important concerns addressed in ANILCA. *Cf.* H.R. Rep. No. 1045, 95th Cong., 2d Sess. 181 (1978). Congress simply could not have intended to exclude coastal waters from protection under § 810.

II. Construction of the Statutory Protection for Admiralty Island Monument Warrants Review

A. As shown by the many acts of Congress that have addressed it, and the 1978 Presidential Proclamation first providing protection, the Admiralty Island National Monument is an important national resource. The proper construction of its statutory protection warrants review.

B. As in *Gambell*, the geographic expression "within the Monument" should be given its plain meaning. *See Amoco Prod. Co. v. Village of Gambell*, 107 S. Ct. 1396, 1408 (1987). The "recognition that Congressmen typically vote on the language of a bill," *id.* at 1406, is especially important in construing ANILCA, which "is comprised of 15 titles and spans 181 pages of the Statutes at Large," *id.* at n.16, and which has an unwieldy legislative history.[3] This is not "that 'exceptional case' where acceptance of the plain meaning . . . would 'thwart the obvious purpose of [ANILCA].'" *Id.* at 1406. To the contrary, construing "within the Monument" to include private inholdings is the *only* way to give the term meaning, for other provisions of ANILCA already prohibit harvesting on the *public* lands within the Monument. ANILCA § 503(f)(1) ("the lands within the Monuments are hereby withdrawn from all forms of . . . disposal . . .") (Pet. App. G2). *See also* § 503(c) (Monument "shall be managed . . . to protect" its resources) (Pet. App. G2).

C. The assertion that giving "within the Monument" its plain meaning would deprive the private inholding of its only economic use is incorrect and unwarranted. Federal Resp. at

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[3] "The tortuous path which ANILCA followed through Congress makes it difficult to discern one true compelling legislative intent" for each provision of the Act. Kueffner, Southeast Alaska Conservation Council Inc. v. Watson *and the Future of ANILCA*, 12 Ecology L. Q. 149, 163 (1984).

12; Shee Atika at 9. As in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 136 (1978), where a zoning restriction was saved in part because the air rights allegedly "taken" could be transferred, the opportunity to exchange the inholding here for lands of equal or greater value outside the Monument removes any asserted inconsistency between § 503(d)'s timber prohibition and the conveyance of the inholding in § 506(c).[4] Not only is exchange specifically available under ANILCA,[5] but the very inholding at issue was previously exchanged by another Native corporation for lands of equal or greater value outside the Monument.[6] Congress was fully aware that the Cube Cove inholding could be exchanged once again for equal or greater value. *See also* § 506(d) (providing continuing authorization to reimburse Native corporations for costs of negotiating land exchange within the Admiralty Monument), 94 Stat. at 2412.

D. Quite apart from ANILCA's exchange provisions or the history of the earlier Cube Cove exchange, the Ninth Circuit's conclusion that the timber prohibition would deprive the inholding of *all value* ("its only real economic use") was only an assumption. Pet. App. A16. Facts, however, govern

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[4] *See also Andrus v. Allard*, 444 U.S. 51 (1979) (recognizing the substantial value implicit in the possibility of exchange, and applying this value to defeat allegations of a regulatory taking).

[5] Exchanges of Native corporation inholdings are authorized by ANILCA § 1302, 16 U.S.C. § 3192 (1982), and ANCSA § 22, 43 U.S.C. § 1621 (1982).

[6] The earlier exchange of the Cube Cove inholding was confirmed by Congress in ANILCA § 506(b), 94 Stat. at 2409. The exchange agreement stated that the Cube Cove inholding "possesses outstanding natural values and ecological significance which should be preserved for public purposes. . . ." *Angoon I*, Plaintiffs' Excerpts of Record, Vol. 1, Tab 25 at 2.

whether a regulation diminishes value sufficiently to require compensation as a "taking,"[7] and facts, not assumptions, must govern whether the prohibition deprives the Cube Cove inholding of all value. There is no support whatsoever for the Ninth Circuit's assumption, and it must be rejected.

E. Also without merit is Federal Respondents' suggestion that § 315 of the Interior Appropriations Act of 1983 mooted Petitioners' challenge under § 503(d). Federal Resp. at 3. Federal Respondents fail to cite the proviso ("nothing herein shall be deemed to amend" ANILCA or ANCSA) (Pet. App. D5). They also fail to mention that the district court rejected this construction of § 315 ("The court does not believe § 315 was intended to moot challenges to the conveyance arising out of ANILCA or ANCSA") (Pet. App. D6) when it addressed Petitioners' claim on the merits, as did the Ninth Circuit. Pet. App. A13-17.

III. The Ninth Circuit's Decision Conflicts With *Fountain v. Filson* and Otherwise Warrants Review

A. The Ninth Circuit's grant of summary judgment on factual claims that were never addressed in the district court conflicts with the holding in *Fountain v. Filson*, 336 U.S. 681 (1949), and chills the use of partial summary judgment.[8] Respondents' attempts to distinguish *Fountain* are unavailing. Federal Resp. at 17; Sealaska at 4–5. Here, the overall factual adequacy of the EIS was not "put in issue by the

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[7] *See, e.g., Keystone Bituminous Coal Ass'n v. De Benedictis*, 107 S. Ct. 34 (1987), *quoting Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

[8] The Ninth Circuit's decision also conflicts with other decisions of the Court. *See* cases cited in Pet. at 21 n.19. *See also O'Connor v. Ortega*, 107 S. Ct. 1492 (1987).

respondents' motions for summary judgment." Federal Resp. at 17. Angoon filed a Rule 56(f) affidavit, noting among other things that "affidavits previously submitted in this lawsuit by experts and subsistence users . . . show that there are contested issues of fact." Shee Atika App. at 28a. Because Angoon's motion for *partial* summary judgment was granted and the EIS was declared inadequate as a matter of law, the district court was never required to rule on the sufficiency of the 56(f) affidavit, nor address factual inadequacies of the EIS. Absent such a ruling by the district court, the Ninth Circuit's grant of summary judgment on factual issues not heard by the district court conflicts with *Fountain v. Filson*.

B. Respondents' attempts to penalize Angoon for not conducting discovery are misleading. The Record of Decision on the FEIS was not issued until February 25, 1985. On March 4, 1985 the district court granted Angoon's motion to consolidate the litigation, Shee Atika App. at 17a; and on April 3, 1985 Angoon filed its consolidated complaint, raising, for the first time, the claim that the FEIS and the Corps of Engineers' permits issued, or about to be issued, for the breakwater and log transfer facility violated NEPA.[9] On May 3, 1985 Respondents moved for summary judgment—two months after the agency action being challenged became final, thirty days after Petitioners' new claim was filed, and only ten days after the minimum twenty day waiting period

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[9] The "EIS is not a decision document and the filing of a final EIS is not to be considered a decision on a permit application. * * * Permit issuance cannot occur until 30 days after the final EIS has been noticed in the *Federal Register* by EPA and the Record of Decision signed." 33 C.F.R. § 230 app. B at 445 (1985). Until the agency action is final, judicial review is not appropriate. *Kleppe v. United States*, 427 U.S. 390, 406 n.15 (1976).

provided in Rule 56(a). As Respondent Sealaska notes, the various motions resulted in thirty-five briefs on the merits in the period that followed, Sealaska at 2 n.4, and "the district court proceedings were a procedural morass." *Id.* at 7. Discovery was neither required nor possible; the Rule 56(f) affidavit was sufficient.

C. Contrary to the argument of Federal Respondents, Federal Resp. at 14 n.6, full review of an EIS is not well suited for summary judgment.[10] Even in EIS cases where there are no disputes of fact and summary judgment is proper, the decision is appropriately made in the first instance by the trial court, not the court of appeals. In this case, there is no indication that the Ninth Circuit read the twenty-four affidavits submitted on subsistence issues alone (*see Angoon II*, Plaintiff's Excerpts of Record, Vol. I, Tabs 1-24) to determine whether they raised disputed issues of fact sufficient to uphold Angoon's Rule 56(f) affidavit.

D. Respondents' contentions that the Ninth Circuit's failure to discuss the summary judgment issue lessens the need to review the holding are unpersuasive. Federal Resp. at 18; Sealaska at 6. The opacity of the Ninth Circuit's decision does not lessen the importance of the issue for review. *Byrd v. Blue Ridge Cooperative*, 356 U.S. 525, 531-32 (1958), *reh'g denied* 357 U.S. 933 (1958). It provides another reason for the Court to exercise its supervisory authority and correct the Ninth Circuit's decision.

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[10] *See* cases cited in Pet. at 21 n.20. *See also Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783, 787-88 (D.C. Cir. 1971) (reversing summary judgment that had declared EIS adequate) ("Rule 56 clearly contemplates that the parties shall have the opportunity for deposition in order to establish the existence of a material issue. * * * The grant of summary judgment [declaring the EIS adequate] prematurely terminated the discovery process and foreclosed plaintiffs' opportunity to substantiate their allegations.")

CONCLUSION

Petitioners respectfully request that their petition for writ of certiorari be granted.

Durwood J. Zaelke
Sierra Club Legal Defense
Fund, Inc.
1531 P Street, N.W.
Washington, D.C. 20005
202/667-4500
Counsel of Record

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